



**Nova Holdings Limited & another v County Government of Mombasa & 2 others
(Constitutional Petition 52 of 2021) [2023] KEELC 22026 (KLR) (5 December 2023) (Ruling)**

Neutral citation: [2023] KEELC 22026 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
CONSTITUTIONAL PETITION 52 OF 2021**

**LL NAIKUNI, J
DECEMBER 5, 2023**

BETWEEN

NOVA HOLDINGS LIMITED 1ST PETITIONER

ASHOK LABSHANKER DOSHI 2ND PETITIONER

AND

THE COUNTY GOVERNMENT OF MOMBASA 1ST RESPONDENT

**THE COUNTY EXECUTIVE COMMITTEE MEMBER LAND HOUSING AND
PHYSICAL PLANNING 2ND RESPONDENT**

THE DIRECTOR OF PUBLIC PROSECUTION 3RD RESPONDENT

RULING

I. Introduction

1. The Ruling by this Honorable Court is fundamentally on whether the Honorable Court should or not conduct a Site Visit (“*Locus in Quo*”) onto all that parcel of land known as Mombasa/ Block XLVIII/57 (Hereinafter known as “The Suit Property”) under the provision of Order 18 Rule 11 of the [Civil Procedure Rules 2010](#).
2. For ease of reference and flow, the Honourable Court feels it imperative to provide a brief background to the subject matter. On 27th July, 2023, while all the Parties were present in Court, M/s. Salim Advocate was holding brief for Mr. Tajbhai Advocate for the 1st and 2nd Respondents, while M/s. Machogu was holding brief for Mr. Oluga Advocate for the Petitioner. Taking that the 1st and 2nd Respondents had not as yet complied with this Courts orders, M/s. Salim Advocate informed Court that she had instruction to make two applications. Firstly, to seek for an extension of time to enable them to file and serve their Written Submissions to the Main Petition dated 17th November, 2021 and filed on 18th November, 2021. Secondly, to request to have the Honorable Court conduct a Site



Visit (“*Locus in Quo*”) and according to her taking that it was a matter of great public importance presumably that the suit land was situated on road reserve. The Learned Counsel asserted that it was from conducting of the said site visit that they would be in a better position to make a decision on whether or not to file and serve their Written Submissions accordingly.

3. As a rejoinder to these two applications, M/s. Machogu Advocate simply retorted that her instruction was limited onto confirming compliance by the 1st, 2nd and 3rd Respondents of the Court direction. She noted that this had not happened due to the reasons imparted by the Counsel for the 1st and 2nd Respondents. She indicated the Petitioner had filed and served both the main and Supplementary Submissions and were ready for were ready to take a Judgment date. However, in view of the situation, she stated that she would leave it to the Court to provide its direction accordingly. Pursuant to this, and based on the brief submissions by the Learned Counsels, the Honorable Court proceeded to make the following orders directed as follows:-
 - a. That the 1st, 2nd and 3rd Respondents are granted 21 days to file and serve their Written Submissions.
 - b. That the Petitioners, thereafter will have 7 days leave to file and serve skeletal Supplementary Submissions onto the new issues of law raised from the Replies by the Respondents.
 - c. That the Court feels and concurs with the 1st and 2nd Respondents on the need to conduct a site visit (*Locus in Quo*) the issues being raised being of great public importance for the date and place to be agreed upon 30th October, 2023 and thereafter for the Court to deliver its Judgment accordingly.

II. The Application by Petitioner

4. On 30th October, 2023, when the matter was listed for further directions as afore stated, Mr. Oluga Advocate for the Petitioner personally appeared. He informed Court that he had formally filed an application vehemently opposing any site visit from being conducted by this Court or taking place as had been ordered by this Court on 27th July, 2023 on date to be agreed on 31st October, 2023. The Learned Counsel urged the Court to set aside and/or discharged the said orders of 27th July, 2023 particularly as regards on the Court conducting a site visit as been ordered accordingly. The Learned Counsel based his argument on two (2) broad grounds:-

Firstly, from the time the Petition was filed in the year 2021 and upon all parties fully complying, this Court emphatically directed the Petition be disposed off by way of Written Submissions. Pursuant to that, on 26th July, 2023 the Petitioner had filed and served their written and supplementary submissions and were only awaiting to be granted a Judgment date. Despite of this the Respondents were still to file and serve their submissions to date.

Secondly, the Petition was filed on the grounds that on 28th September, 2021 the 1st Petitioner was served with the Enforcement Notice by the 2nd Respondent ostensibly requiring the 1st Petitioner to stop and restore the land to its original form, and the same time the 2nd Petitioner was maliciously charged at the County Government on charges of trespass on the suit land which to him was illegal and unconstitutional act by the 2nd Respondent. He argued that the allegations were vexatious, scandalous and frivolous in utter violation of the fundamental rights of the Petitioners, taking that they were made before the land surveying exercise had been conducted onto the suit land by the Respondents to have arrived at the conclusion that indeed the land was on a road reserve. He asserted that, the reason they were now pushing for the site visit to take place through Court’s facilitation was acting in bad



faith but to aid their case and allegation. It was this situation that compelled the Petitioners to institute this Petition herein whatsoever. To buttress his argument the Learned Counsel referred the Honorable Court to its Ruling delivered on 21st July, 2022 over the same subject matter and in particular the contents of Paragraph 15.

III. The 2nd Respondents Case

5. The application to set aside the Court order made on 27th July, 2023 was opposed strongly by Mr. Tajbhai Advocate for the 2nd Respondent. He admitted that they had applied to have Court first and foremost conduct a site visit (*Locus in Quo*) as a pre – condition to allow them to either file and serve their Written Submissions to the Main Petition or not. He asserted that they had withheld filing the submissions as they were highly convinced that the suit land fell on a public reserve. To him, this information would be revealed and become evident to wit the suit land was on a road reserve and an encroachment once the site visit was conducted by Court as ordered. To them should there be no encroachment then it would be a case of “*fait compli*” where there would be no need for the adjudication process of the Main Petition to save court of the previous judicial resources.

IV. Analysis and Determination

6. I have keenly considered all the issues raised from the oral submission made out by the Petitioners and the Respondent and the relevant Provision of the law. For the Honorable Court to reach a fair and just decision on the matter it is of the opinion it needs to be guided by the following Three (3) issues.
 - a. Whether there is any validity for setting aside and/or discharging the orders made by this Court on 29th July, 2023.
 - b. Whether this Court should or not conduct a site visit as envisaged in the given circumstances.
 - c. Who will bear the costs of this application?

Issue No (a) Whether there is any validity for setting aside and/or discharging the orders made by this Court on 29th July, 2023.

7. Under this Sub - heading the main substratum is two fold. A). whether the Court should set aside and/or discharge its orders granted on 27th July, 2023 in particular the one to conduct a site visit on the Suit land prior to the 2nd Respondent filing and serving their Written Submissions to the Main Petition and hence taking a Judgment date. B). To proceed on conducting the Site Visit in the given circumstances. Clearly, the 2nd Respondent are using the site visit as a pre- condition to either proceed or not with the adjudication process of either opposing it or conceding accordingly. I will come back to specifically deal with their matter.
8. On the issue of whether to set aside or not the Court order made out on 27th July, 2023. The principles governing setting aside and/or varying Court orders under Constitutional Petitions are found under Rule 25 of the [Constitution of Kenya \(Protection of Rights and Fundamental Freedom\) Practice and Procedures, Rules 2013](#) (also known as “The Mutunga Rule) which provide: -

“Setting aside, varying or discharge - An order issued under Rule 22 may be set aside by the Court either on its own motion or on application by a party dissatisfied with the order”.
9. From the above Provision of the law it’s evident that Courts have unfettered judicial discretion when it comes to setting aside its own orders. The Honorable Court has provided direction on this matter in numerous decisions. There will be no need to re - invent the wheel in the given circumstances.



In the cases of “*Esther Wamaitba Njibia & Two (2) others v Safaricom Limited* - HCCC No 62 of 2011; *Shah v Mbogo* 1969 EA 116 and *Patel v E.A Cargo Handling Services Ltd* (1974) E.A 75 the Court elucidated the consideration to guide the Court in applications of this nature as follows: -

“The discretion is free and the main concern of the Courts is to do justice to the Parties before it. The discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist a person who deliberately sought, whether by evasion or otherwise to obstruct or delay the cause of justice”.

Once the Court is satisfied that there is sufficient cause to do so it will proceed to grant the orders sought accordingly – meaning to avoid a situation of abusing the Court process.

The *Black Law dictionary*^{9th} Edition defines “Sufficient cause” to mean the burden placed on a litigant (usually by Court rule or order) to show why a request should be granted or an action excused – it must be rational plausible, logical convincing reasonable and trustful.

In other words the cause should not leave any doubt in a Judge’s mind. The explanation should not leave unexplained gaps in the sequence of events.

10. From the record, the Learned Counsel for the Petitioner sent a Counsel, M/s. Machogu to hold his brief and whereby she emphatically indicated her instructions were limited. Although my brother Justice Hewett (Rtd) would often state that an Advocate holding brief meant taking up the whole matter, would fully appreciate the predicament M/s. Machogu Advocate found herself in on the material day when the Counsel Ms. Salim Advocate holding brief for Mr. Tajbhai Advocate pressed for an order of the Court to conduct a site visit.
11. Secondly, Mr. Oluga Advocate feels like this application and the order to conduct site visit being the second time it was being made – would be prejudicial to his client who already has been arraigned in Court and charged in Court for allegation of trespass on the suit land. Furthermore, the 2nd Respondent had never conducted any land surveying on the land and hence clearly were utilizing Court a stepping stone to justify their allegation that indeed the land was on a road reserve.
12. For all these reasons, he strongly held the fundamental rights of his client to property would be infringed and violated. Indeed, I discern that, while the Petitioners filed and served their Submissions a while ago and had been waiting for a Judgement date, none of the Respondents have complied to the previous orders to have filed their submissions within the given timeframe. Furthermore, the Learned Counsel for the 2nd Respondent admitted that they would be waiting for the site visit to be conducted and its report to enable them file their Written Submissions or not. To me all these constitutes sufficient reasons and cause to set aside and/or discharge the orders granted on 27th July, 2023.

Issue No (b) Whether this Court should or not conduct a site visit as envisaged in the given circumstances.

13. Under this Sub - heading the Honorable Court notes that site visit have not been provided for under the *Mutunga Rules*. Hence the Provision applicable can be *Civil Procedure Rules 2010* – Under Order 18 Rules 11 which holds: -

“The Court may at any stage of the suit inspect any property or thing concerning which any question they arise”.



This Court taken judicial cognizance that through its Ruling delivered on 21st July, 2022 on the same subject matter did in-depth; explained the purpose for site visit which is basically a judicial process for conducting inspection on law matters are on the ground as opposed to conducting proceedings or gather new evidence to be utilized to aid any party in the case. It is judicial process as a hearing in open court. It should be part of the record in all its aspects, in terms of the date when it is scheduled, the Coram and what took place. Parties should be made aware of the date when it is scheduled and be given the opportunity to be present during the visit and to offer evidence in response to any notes taken by the Court during the visit. See the Court of Appeal decisions of *Cyrus Nyaga Kabute v Kirinyaga County Council* (1987) eKLR *Beatrice Ngunyo Ndungu & another v Samwuel K. Kanyoro & 2 others* (2017) eKLR and *Ayoyih – Muhamnji* (ELC Appeal No 11 of 2022) eKLR 2023. Hence I need not belabor the point.

14. From the facts of this case, I have noted that an allegation on encroachment onto a road reserve has been made by the 2nd Respondent. Indeed to advance on that serious assertion the Petitioner has not only been charged in a Court of law for the charge of encroachment onto the suit land intended or set aside for public use- road reserve but also elaborate land surveying has been conducted and empirical documentary evidence filed accordingly. With this in mind, I find rather strange and confusing when the 2nd Respondent states that they have withheld filing and serving submissions as they are awaiting for the Court to conduct a site visit and hence its report to make a decision as to whether to proceed on with the adjudication process of opposing the petition or not.
15. These reasons compel me to concur with the concerns raised by the Learned Counsel for the Petitioner that the site visit might be utilized in bad faith. I am persuaded to lift the legal ratio I applied under Paragraph 15 of the aforesaid Ruling verbatim: -

15. “In the instant case, certainly this was not an application requesting for site visit as envisaged by law. On the contrary, it is done requesting Court to grant them an order to enter into the suit land currently occupied by the 1st and 2nd Petitioners on their own. Three (3) things come to fore.

Firstly, they are not requesting Court to supervise the entry nor have all the parties to be present as they enter the Suit land.

Secondly, the orders sought is to conduct a land survey and hence obtain information regarding the measurement of the land and also ascertain the allegation of encroachment into the reserved land and finally they are requesting for this order after they had already served the Enforcement Notice upon the Petitioners and charged them on the allegation of the encroachment onto a road reserve.

Despite all the thorough investigation using aerial devices and survey maps and the information gathered by them which made them conclude indeed the Petitioners had encroached onto the Suit land into the road reserve and hence issued with an Enforcement Notice still that would not be enough for them. At no particular incident or juncture that the Court should be used by litigants as a peddle to gather empirical oral and documents evidence to aid their cases. That would be travesty of justice and a clear case of unfair hearing. It was one of placing the cart before the horse. It was a state of affairs that caused the Petitioners to move Court by filing this Constitutional Petition seeking constitutional remedy on the basis of the ostensible violation, denial, threat and infringement of their fundamental rights as well safeguarded under the Bill of Rights of the Constitution of Kenya, 2010.



From that application declined to grant the reliefs sought by the 2nd Respondents being guided by the principles “Stare decisis” this Honorable Court will proceed to apply the same reasoning and decline to allow for the request made orally by the 2nd Respondent to conduct a site visit.

Issue No (c) Who will bear the costs of this application?

16. It’s now well established that costs are at the discretion of the Court. The proviso of Section 27 (1) of Civil Procedure Act, Cap. 21 holds that costs follow the event.
17. In this case, and from surrounding facts, I direct that each party to bear their own Costs.

V. Conclusion and disposition

18. Upon conducting the analysis of the framed issues herein, the Honourable Court makes the following orders:-
- a. That the orders by this Court made on 27th July, 2023 be and are hereby set aside or discharged particularly the order on conducting a site visit onto the suit land.
 - b. That the oral request to conduct a site visit by the 2nd Respondent be and is hereby disallowed accordingly.
 - c. That all the other orders made on 27th July, 2023 to remain in force – to wit: -
 - i. the 1st, 2nd and 3rd Respondents are granted 21 days to file and serve their Written Submissions.
 - ii. the Petitioner, thereafter will have 7 days leave to file and serve skeletal Supplementary Submissions onto the new issues of law raised from the Replies by the Respondents.
 - d. That there be a Mention on 31st January, 2024 to ascertain full compliance of these orders accordingly and further direction.
 - e. That the Honorable Court to proceed to render its Judgment on the Petition dated 17th November, 2021 on 7th March, 2024.
 - f. That each Party to bear their own costs.

It is so ordered accordingly

RULING DELIVERED VIA EMAIL AS PER THE NOTICES DISPATCHED TO ALL PARTIES SIGNED AND DATED AT MOMBASA THIS 5TH DAY OF DECEMBER 2023

HON. JUSTICE L.L. NAIKUNI (MR.)

ENVIRONMENT & LAND COURT AT MOMBASA.

Copy sent by M/s. Joan Ndwiga (Office Admin) to:

Oluga & Co. Advocates...Email. Olugaadvocates@gmail.com

The County Attorney,...Email: countyattorney01@gmail.com

Director of Public Prosecution,..Email.: attorneylitigation2020@gmail.com**

